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Supreme Court of the United States

October Term, 1962

No. 1007

JOHN ARTHUR LUOMOLA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 5, 1962.

The Opinions Below

The District Court wrote no opinion. The *per curiam* opinion of the Court of Appeals is reported at 301 F. 2d 138, and is annexed hereto as Appendix A, *infra*, page 11.

Statement of Grounds of Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1962 (Appendix A, *infra*, at page 13).

The jurisdiction of the District Court was based upon 18 U. S. C. Sec. 3231 and upon 21 U. S. C. Sec. 176(a).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1); under 28 U. S. C. Sec. 2103; and under Rule 37(c) of the Federal Rules of Criminal Procedure.

28 U. S. C. Sec. 2103 provides, in pertinent part, as follows:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state, or of a United States court of appeals, in a case where the proper mode of a review is by a petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for a writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken."

The instant petitioner took an appeal from the judgment of the United States Court of Appeals, Ninth Circuit (Appendix B, *infra*). This appeal was, in fact, improvidently taken, both with respect to form of remedy and with respect to timeliness, as shown in Appendix C, *infra*, wherein the petitioner personally relates the circumstances under which he prepared his appeal *pro se* while imprisoned and physically restrained from retaining counsel or writing his own papers in any timely manner.

Rule 37(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "Petition to the Supreme Court for writ of certiorari shall be made in the manner and within the time prescribed by its rules."

The above-quoted statutory language clearly confers jurisdiction upon this Court to entertain petitions for certiorari filed in whatever time or manner this Court may rule just and proper. In other words, timeliness herein is discretionary, not jurisdictional. See *Heflin* v. *United States*, 358 U. S. 415, 418, fn. 7 (1959). This Court has never

held to the contrary. *United States* v. *Robinson*, 361 U. S. 220, was decided upon a wholly different issue, namely, the jurisdiction of the Court of Appeals under Rule 45(b) of the Federal Rules of Criminal Procedure.

The circumstances set forth in Appendix C show that this is a situation where the thirty day filing rule of this Court should not be automatically applied. While such rule is susceptible of complete application to a person who has his freedom, it should not be so applied to the petitioner, a prisoner who for a period of thirteen (13) days (5 in transit and 8 in isolation) was in captivity, which made preparation and filing of a petition for a writ of certiorari absolutely impossible. The proper suspension of the running of the thirty-day period for these thirteen days makes the filing of the Notice of Appeal on or about May 8, 1962 a timely filing of an application for a writ of certiorari (28 U. S. C. 2103; Rules, Sup. Ct. 22(2)).

Question Presented

Whether the Sixth Amendment to the Constitution requires that a Federal District Court permit court-appointed counsel for the defendant in a criminal trial to withdraw and be replaced by counsel retained by the defendant on motion of the defendant before pronouncement of sentence.

Statement of the Case

Petitioner was indicted, tried, convicted and sentenced in United States District Court for the Southern District of California on a charge of illegally importing approximately one pound of marijuana into the United States in violation of 21 U. S. C. Sec. 176a.

On trial in the District Court, petitioner was represented by court-appointed counsel. After the verdict, and before

pronouncement of sentence, petitioner moved for a continuance in order to substitute counsel of petitioner's own choice, retained by petitioner for the purpose of presenting to the Court certain facts and points of law affecting petitioner's sentence and judgment of conviction. (See Petitioner's Affidavit, Appendix C, *infra*). Leave for petitioner's court-appointed counsel to withdraw, and be replaced by counsel retained by petitioner, was requested of the District Court, both by the court-appointed counsel and by petitioner himself. (See Excerpt from Transcript of Trial Minutes, Exhibit D, *infra*). The minutes show that the motion was brusquely overriden by the District Court:

> "The Court: * * * Now, are you ready for sentence?
>
> The Defendant: No, your Honor.
>
> The Court: You can sit down. Counsel will take care of that.
>
> Mr. Sheela: Your Honor, the defendant has engaged—of course I was appointed—he has engaged an attorney, Mr. Shamsky, to represent him after the motion for a new trial has been made, and I believe that he would like to have me relieved at this point and make a motion for continuance on the judgment.
>
> The Court: The motion is denied. And I am going to pronounce sentence at this time. And if there is anything that develops later on, we will take it up as it comes. The Court will now pronounce sentence.
>
> Mr. Sheela: Your Honor, of course, it is obvious that my participation in this case is going to end very shortly, but from the statements that counsel has made, I think perhaps it would be in the interests of everyone were the sentence matter to be continued over—for how long, three or four days?
>
> The Defendant: Yes.
>
> Mr. Sheela: Three or four days so that this other attorney could come in and be representing him; because this is the first I knew that he had retained an attorney at this point. I told him that I didn't feel,

I didn't want to handle and he, want to handle the appeal on this matter although—and he does have some other matters that he wants to present prior to judgment so—and I can't see how the government would suffer because he will be incarcerated.

The Court: I am going to pronounce judgment. * * *

* * *

The Court: If there is anything you want to say before sentence is pronounced, say it further. This is your last opportunity now.

The Defendant: Yes, I wish that judgment is not pronounced until I be given an opportunity to have Mr. Shamsky appear and show further cause, your Honor.

The Court: That motion is denied."

The Court forthwith sentenced petitioner to five years imprisonment without affording petitioner herein an opportunity to be represented by counsel of his own choice.

A notice of appeal was filed in the United States Court of Appeals, Ninth Circuit, on January 19, 1961. The Court of Appeals found no error, and affirmed the judgment of the District Court on April 5, 1962.

Reasons for Granting the Writ

This petition directly invokes the constitutional right of a defendant in a criminal proceeding to retain counsel of his own choice at any stage of trial, under the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence."

The right to retain counsel of one's own choice has recently received less attention than the cognate right to court-appointed counsel for indigent defendants. Yet

the core of the constitutional right to counsel has always been the right of any person accused of any crime to be represented by any counsel he chooses, and who chooses to represent him, at any stage of trial. This may be taken as the intent of the framers of the Constitution.

> "It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the Assistance of Counsel for his defence' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him."
>
> Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N. Y. U. Law Q. 1, 7 (1944).

Thus, although the precise form in which this vital constitutional right has been violated by the lower Federal courts in the present case may be novel or of first instance in reported decisions, nevertheless, the principles at stake are well settled—and settled in direct opposition to the decision herein of the Court of Appeals, Ninth Circuit.

The *per curiam* opinion of the Court of Appeals affirming this petitioner's conviction, rationalized the District Court's denial of petitioner's constitutional right to counsel of his own choice in the following language (at 301 F. 2d 139):

> "Counsel [appointed by the Court] then representing defendant was fully aware of all previous proceeding [*sic*] and was fully, if not more, competent to represent defendant at the time of sentencing than any new attorney."

This language appears to promulgate a new constitutional gloss to the effect that a defendant's right to counsel is subordinate to the Court's power to appoint coun l the

Court considers "fully if not more competent to represent defendant." *

A great English trial judge (Mr. Justice Erle) said: "I do not think that I have any authority to assign counsel to a prisoner without his consent." *Reg.* v. *Ysenado*, 6 Cox Crim. Cases 386, 387 (1854). A similar view has always been taken by most United States courts. The contrary doctrine, adopted by the Court of Appeals, Ninth Circuit, in the present case, has been repeatedly rejected by other United States Courts of Appeals, and is opposed to the position taken by this Court in *Glasser* v. *United States*, 315 U. S. 60, and *Chapoton* v. *Prettyman*, 348 U. S. 3.

In the *Glasser* case, *supra*, Mr. Justice Murphy said (at 315 U. S. 75, 76):

> "There is yet another consideration. Glasser wished the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. * * * To determine the precise degree of prejudice sustained * * * as

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* One need only face the reality of criminal trial practice to realize that an evaluation of the performance of court-appointed counsel by the court must be incomplete and without factual foundation. As one qualified commentator has noted:

> "I have noted with disgust, from time to time, remarks made by appellate justices in which they asserted that a certain defendant who had assigned counsel was given the finest defense. From my experience, I do not see how a judge can tell whether a man had a good defense, because what goes on in court possibly represents only 50 per cent of the actual work done in the preparation of a trial."

> Public Defender of Los Angeles County, quoted in Trebach, *The Criminal Process and Legal Aid in New Jersey* (1958), pp. 139-40 (unpublished thesis in Firestone Library, Princeton, N. J., re-quoted in Note, 107 U. Pa. Law Rev. 812, 828 (1959), and in Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. Chi. Law Rev. 1, 61 (1962).

> a result of the court's appointment * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

In the *Chandler* case, *supra*, Mr. Chief Justice Warren said (at 348 U. S. 9):

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

The *Glasser* decision, *supra*, was cited, quoted and followed by the United States Court of Appeals, Third Circuit, in *United States* v. *Bergamo*, 154 F. 2d 31, 34 (3rd Cir., 1946), where that Court said:

> "The Sixth Amendment provides inter alia that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' The Supreme Court has held that the right to the assistance of counsel includes the right to counsel of defendant's choosing."

This Court recently emphasized the principle in *Gideon* v. *Wainwright*, No. 155—October Term 1962, 31 U. S. Law Week 4291, 4293 (March 18, 1963), wherein Mr. Justice Black, writing of the importance of counsel under the Sixth Amendment, states:

> " '[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty * * *. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'. *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938). To the same effect, see *Avery* v. *Alabama*, 308 U. S. 444 (1940), and *Smith* v. *O'Grady*, 312 U. S. 329 (1941)."

The *Chandler* decision, *supra*, was cited and followed by the United States Court of Appeals, Fourth Circuit, in

Reickauer v. *Cunningham*, 299 F. 2d 170 (4th Cir., 1962) certiorari denied, 371 U. S. 866, wherein petitioner had been compelled to accept the services of court-appointed counsel. The Court of Appeals, Fourth Circuit, said (at 299 F. 2d 172):

> "Certainly the petition alleges precise and distinct facts which, if true, show that the petitioner was denied counsel of his own choice. Such denial violates the due process clause of the Fourteenth Amendment and renders his conviction and sentencing void. This right is absolute and no showing of special circumstances is necessary. *Holly* v. *Smyth*, 280 F. 2d 536 (4th Cir., 1960); *Chandler* v. *Freitag*, 348 U. S. 3 (1954). This is not the situation where the court is requested to appoint counsel for a defendant * * *."

The essentiality of representation by defendant's counsel at the time of pronouncement of sentence was stressed by the Court of Appeals, Fifth Circuit, in *Martin* v. *United States*, 182 F. 2d 225, 20 A. L. R. 2d 1236 (5th Cir., 1950), certiorari denied, 340 U. S. 892, where that Court said (at 182 F. 2d 227):

> "The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the constitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must then, or shortly, be determined. Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the court in its administration and enforcement of penal laws. Any Judge with trial Court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension of penalty. That it is also true that such discussion sometimes has a contrary result, does not detract from the fact

that the nature and possibilities of this important stage of the proceedings are such as to make the absence of counsel presumably prejudicial."

Accord: *Rabbins* v. *Green*, 218 F. 2d 192 (1st Cir., 1954); *Gadsen* v. *United States*, 223 F. 2d 627, 630 (D. C. Cir., 1955); *Ellis* v. *Ellisor*, 239 F. 2d 175 (5th Cir., 1956).

In the present case the decision of the Court of Appeals, Ninth Circuit, is contrary to the decisions of other Courts of Appeals, and of this Court, cited and quoted *supra*. Certiorari is therefore requested so that this Court may determine the Constitutional issue presented.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MORRIS J. KAPLAN,
165 Broadway
New York, N. Y.
Attorney for Petitioner.

DAVID G. LUBELL and
STEVEN L. WERNER
LUBELL, LUBELL and JONES
of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,377

Apr. 5, 1962

JOHN ARTHUR LUCOMOLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: ORR, BARNES and JERTBERG, *Circuit Judges*.

PER CURIAM:

Appellant was convicted by a jury on one count of smuggling marihuana into the United States. Jurisdiction existed below pursuant to 21 U. S. C. § 176(a), (19 U. S. C. §§ 1461, 1484 and 1485) and exists here pursuant to 28 U. S. C. § 1291.

But two errors are urged. First: that the court erred in not admonishing the jury to disregard certain remarks made by the prosecuting attorney in argument to the jury. Second: that the court erred in not granting the defendant a continuance, after a motion for new trial had been denied, and before sentence, so that new counsel of de-

fendant's choice rather than court appointed counsel could represent defendant.

We agree with the trial judge that there was no need to admonish the jury by reason of counsel's argument; that the prosecution's remarks fall well within the permissible bounds of legitimate argument to a jury in response to an argument advanced by defense counsel.

On the second issue, appellant was given his full right of allocution, not once but several times. He advised the trial judge that he wished to have two witnesses (one a doctor) testify on his behalf before sentence. The doctor was not to testify with respect to appellant's mental condition, but to give an opinion as to whether appellant had smuggled drugs previously. The lay witness (the arresting officer who had already testified and had been cross-examined in the case) was to testify that it was his belief the defendant had been "set up" for his arrest.

The testimony of neither witness was material or relevant at the time of sentence, even were we to assume it was admissible (which we do not). The court properly denied any further delay in sentencing. Counsel then representing defendant was fully aware of all previous proceeding, and was fully, if not more, competent to represent defendant at the time of sentence than any new attorney.

Finding no error, we affirm.

(Endorsed) Per Curiam Opinion Filed Apr. 5, 1962.

FRANK H. SCHMID,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17377

JOHN ARTHUR LUCOMOLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court of the Southern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 5, 1962.

APPENDIX B

Notice of Appeal

FILED
May 14, 1962
FRANK H. SCHMID, Clerk

TO THE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT, SAN FRAN. CALIF.

JOHN ARTHUR LUOMALA,

Pet-appel.,

against

THE UNITED STATES.

To: The good Clerk of U. S. Court of Appeals, 9 Circuit, San Fran. Calif.

Sir:

Notice is hereby given, of the above pet-appellants intention to appeal a final order rendered by the U. S. Ninth Circuit Court of Appeals, said order denying pet-appellants motion to vacate judgment and conviction on direct appeal, said order handed down on April 5, 1962.

THE QUESTION TO BE ASKED ON APPEAL

Did not the sentencing Court err constitutionally, in refusing defendant, at that time, counsel of his own choosing? Was not this a denial of "due process of law" and

the "Counsel rights" guaranteed by the U. S. Constitution, Sixth Amendment? Was not the defendant precluded from motioning for a new trial and challenging the jurisdiction of the trial court to try him and demanding a stay of execution?

Was not the denial of Counsel of defendants own choosing a prejudicial and unconstitutional act on part of the sentencing court precluding a full and fair and impartial appeal by the defendant?

Did not the Court err, constitutionally, by refusing defendant his constitutional and statutory right to show legal cause, through counsel of his own choosing, why judgment should not then and there have been pronounced?

Was it not a violation of Constitutional and Statutory and factual law—for the sentencing court to force trial attorney to continue representing a defendant with whom he was in confessed dis-accord and disagreement with? Does not a situation of this sort give rise to the possibility of prejudice on the part of the court and unconscious incompeteney on the part of trial attorney?

Was not irresponsible, uncorroborated statements made by the prosecution in summation alleging to defendant to have a background as a smuggler (objected to and allowed to stand) unconstitutional, and, was not the court in constitutional error to allow such false prejudicial statements to stand as fact?

You are further notified that defendants transfer from the U. S. Penitentiary at Steilacoom, Washington to the U. S. Penitentiary at Lewisberg, Pennsylvania, during the 30 days period for filing this notice interrupted all communications with his attorneys and forced him to humbly prepare the instant matter.

You are hereby asked to send any and all records pertaining to this case to the Clerk of the United States Supreme Court, Wash. D. C.

Filing fee hereof will be mailed you.

You are further noticed that Court of Appeals Appointed Appeal Attorney withdrew from the case without letting pet-appellant know if he, said attorney, had safeguarded his appeal rights by filing Notice of Appeal.

Dated May 3, 1962. Lewisberg, Pennsylvania.

Carbon Copies to:

U. S. Solicitor Generals Office Wash., D. C.
U. S. Attorney, U. S. Dist. Court, San Diego, California.

Respectfully submitted,

JOHN ARTHUR LUOMALA,
Pet-Appellant.

Sworn to before me this 7 day of May 1962.

APPENDIX C

Petitioner's Affidavit in Support of Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

JOHN ARTHUR LUCOMOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF PENNSYLVANIA }
COUNTY OF UNION } ss.:

JOHN ARTHUR LUCOMOLA, being duly sworn, deposes and says:

I am the petitioner in the above case.

I am a prisoner in the United States Penitentiary at Lewisburg, Pennsylvania upon sentence of the United States District Court for the Southern District of California entered in a judgment of conviction on January 16, 1961.

Prior to rendition of the said sentence of imprisonment and judgment of conviction I personally retained legal counsel for the purpose of showing to the trial court that the said sentence should not be pronounced without hearing certain evidence and considering certain points of statutory and Constitutional law which had not been presented by my

court-appointed counsel. I instructed the said court-appointed counsel to resign and to request a reasonable continuance for substitution of the aforesaid counsel of my own choice.

Accordingly the said court-appointed counsel appeared and moved before the said trial court for leave to withdraw from the case and for a continuance to substitute the aforesaid counsel of my own choice to represent me during the remainder of my trial. This motion was summarily denied and thereupon the said trial court proceeded forthwith to pronounce sentence of imprisonment and to render judgment of conviction absent counsel of my own choice and without hearing the evidence or the points of law which I had retained the said counsel to present to the said trial court.

On April 10, 1962, the said trial court vacated an order fixing bail. On April 15, 1962, while imprisoned pursuant to the terms of the said sentence of imprisonment, I received a copy of a decision of the United States Court of Appeals, Ninth Circuit, dated April 5, 1962, affirming the said judgment of conviction, which constituted my first notice of the said decision.

On April 17, 1962, while still imprisoned as aforesaid, I received notice that counsel previously appointed by the court to represent me had withdrawn from the case without filing further appeal on my behalf.

From April 17, 1962 to April 20, 1962, while still imprisoned as aforesaid, I unsuccessfully attempted to retain legal counsel; and I then commenced to prepare papers of appeal on my own behalf.

On about April 20, 1962, I was suddenly and involuntarily removed for transfer to the United States Penitentiary at Lewisburg, Pennsylvania. The said transfer necessitated some six days of travel, during which entire period of time I was physically restrained and prevented from attempting to retain legal counsel and from preparing papers of appeal on my own behalf.

From about April 25, 1962, to May 2, 1962, I was imprisoned in isolation in the Admission and Orientation Center of Lewisburg Penitentiary, during which entire period of time it was physically impossible for me to retain legal counsel or to prepare papers of appeal on my own behalf.

On May 3, 1962 I was admitted to the main section of Lewisburg Penitentiary where, for the first time, it became physically possible for me to prepare papers of appeal on my own behalf. Accordingly, on May 3, 1962, I hastily prepared a form of notice of appeal. I then immediately attempted to find a notary so that the said notice of appeal could be executed and sworn to. Nevertheless the restrictions imposed by my imprisonment precluded me from executing and swearing to the said notice of appeal until, May 7, 1962.

On May 7, 1962, I succeeded in executing the said notice of appeal and in mailing copies thereof to the office of the United States Solicitor General, to the United States Attorney at San Diego, California, and to the Clerk of the United States District Court, Ninth Circuit, San Francisco, California.

Upon information and belief, the copy of said notice of appeal which I mailed, as aforesaid, to the Clerk of the United States District Court, Ninth Circuit, San Francisco, California, was received and filed by the said Clerk under date of May 14, 1962.

STATE OF PENNSYLVANIA }
COUNTY OF UNION } ss.:

I, JOHN ARTHUR LUOMOLA, being duly sworn, depose and say that the matters and things stated in the foregoing affidavit and described as facts are true, and that the matters therein stated as upon information and belief I believe to be true.

JOHN ARTHUR LUOMOLA,
Petitioner.

Subscribed and sworn to me this 19 day of February, 1963.

JOHN M. McGOUGH,
Notary Public.
Parole Officer—Authorized by Act of July 7, 1955 to administer oaths (18 U. S. C. 4004).

(SEAL)

My commission expires

APPENDIX D

EXCERPTS OF TRANSCRIPT ON SENTENCING

[29] Now, are you now ready for sentence?

The Defendant: No, your Honor.

The Court: You can sit down. Counsel will take care of that.

Mr. Sheela: Your Honor, the defendant has engaged — of course, I was appointed — he has engaged an attorney, Mr. Shamsky, to represent him after the motion for new trial has been made; and I believe that he would like [30] to have me relieved at this point and make a motion for continuance on the judgment.

The Court: The motion is denied. And I am going to pronounce sentence at this time. And if there is anything that develops later on, we will take it up as it comes. The Court will now pronounce sentence.

Mr. Sheela: Your Honor, of course, it is obvious that my participation in this case is going to end very shortly, but from the statements that counsel has made, I think perhaps it would be in the interests of everyone were the sentence matter to be continued over — for how long, three or four days?

The Defendant: Yes.

Mr. Sheela: Three or four days so that this other attorney could come in and be representing him; because this is the first I knew that he had retained an attorney at this point. I told him that I didn't feel, I didn't want to handle and he want to handle the appeal on this matter although — and he does have some other matters that he wants to present prior to judgment so — and I can't see how the government would suffer because he will be incarcerated.

The Court: I am going to pronounce judgment. Then, if there is anything that develops later on that will cause

the Court to vacate the judgment, that is a different matter. But I want to finish this case.

[31] The Defendant: Before pronouncing judgment, may I say something, your Honor?

The Court: No, you can't say any more. You said what you wanted to say.

The Defendant: No, I haven't your Honor.

Mr. Hofflund: May it please the Court, we would ask the Court to reconsider the matter on whether or not the defendant could be heard prior to pronouncing sentence. He has only been heard on what purports to be matter for new trial, your Honor.

The Court: We have already heard him.

Mr. Hofflund: But on the matter of sentencing I would respectfully request the Court—I realize that this is a difficult matter; but there is a recent appellate decision your Honor is aware of.

The Court: I know about that appellate decision. I have used that method all the time. I have always given the defendant—

Mr. Hofflund: Surely, your Honor. And I hesitate to interfere with the Court's procedure.

The Court: You are reminding me of that matter. If there is any legal cause to show—if there is anything you want to say further, you may say it.

The Defendant: Yes. Thank you, your Honor.

Mr. Sheela told me that he was unable to prosecute [32] this case, represent me further than the motion for a new trial. And I did want someone to represent me after the motion for a new trial was made, and I engaged and retained a Mr. Shamsky to represent me on other matters which, in the interest of justice, the Court should know.

The Court: The matter is what?

The Defendant: There is a Dr. Roebuck and Mr. Pederson, the arresting officer, wishes to make statements to this Court about this case before judgment is pronounced. And

the statements which they wish to make or will make will be beneficial to the defendant.

The Court: Will that have to do with your mental condition; is that what you are talking about?

The Defendant: No. No, your Honor, no.

And we, Mr. Shamsky and I have discussed other motions which should be made and which have merit, your Honor.

The Court: Have you retained him, actually?

The Defendant: Yes, I have retained him, actually.

The Court: Actually paid him a fee?

The Defendant: Yes.

The Court: And he is now your counsel?

The Defendant: Yes.

The Court: Why isn't he here?

The Defendant: I told him that Mr. Sheela, Mr. Sheela will withdraw after the motion for a new trial is made. [33] And these were the conditions under which I retained him.

The Court: Well, I want to complete this matter so long as Mr. Sheela is your counsel.

The Defendant: Well, Mr. Sheela will withdraw after the motion for a new trial has been made.

The Court: He has already made it, and it has been denied.

The Defendant: Well, yes, there are other matters which will be legal cause, which will attempt to show legal cause.

The Court: I don't want to go over this matter again.

Mr. Hofflund: Your Honor, I urge you to proceed with the pronouncement of sentence. Nobody has heard from Mr. Shamsky. We have only the defendant's uncorroborated statements.

The Defendant: The County jail record can verify that I have paid Mr. Shamsky a sum of money to represent me; and a telephone call to the County jail will verify that.

The Court: Why hasn't he collaborated with Mr. Sheela?

The Defendant: Pardon?

The Court: Why has he not collaborated with Mr. Sheela in this matter?

The Defendant: He advised me to let Mr. Sheela go ahead for the motion for a new trial.

The Court: I don't care what he advised you.

[34] The Defendant: He told me he would here after Mr. Sheela had withdrawn; and then he would, that he would represent me further, your Honor.

The Court: I haven't the vaguest idea what you have in mind—

The Defendant: There are—

The Court: —for a reason for a continuance. If you have in mind for the purpose of proceeding on appeal, that matter will come up after sentence.

The Defendant: There is a motion, pre-sentence, two motions which Mr. Shamsky will make.

The Court: What motion?

The Defendant: There will be two motions. One will be to have Mr. Pederson, the arresting officer, be here in court and Dr. Roebuck be here in court.

The Court: For what purpose?

The Defendant: To show that legal cause why judgment should not be pronounced against this defendant.

The Court: To show what?

The Defendant: Legal cause why judgment should not be pronounced against this defendant.

The Court: What is that?

The Defendant: Now—

The Court: What is that legal cause that you call?

The Defendant: Mr. Pederson at the arrest of this [35] defendant told him that he believed the defendant was set-up in this matter. That he set-up for this matter. And Mr. Pederson has been inclined to believe, and he has testified in this defendant's behalf.

The Court: You had an opportunity to bring him before the Court during the trial.

The Defendant: He wishes to speak to this Court before sentence is pronounced.

Mr. Hofflund: Mr. Pederson does not so wish to address the Court, I may advise your Honor. At least, he hasn't communicated any such fact to me. And Mr. Pederson was a witness in the case and was cross-examined by the defendant. The matter that the defendant wishes to bring now has, of course, nothing to do with the sentence, any sentence that might be pronounced by the Court.

The Defendant: Mr. Pederson came to the County jail and visited me and told me he would appear in court.

The Court: Mr. Pederson gave his testimony. He is through insofar as his services are concerned.

The Defendant: He wishes to address the Court before sentence, and he said that he will. And Dr. Roebuck is someone else, your Honor, who I wish to be here.

The Court: What does Dr. Roebuck have to do with it?

The Defendant: He is to testify as to the previous occupations of this defendant; that they were of such a nature [36] that the defendant has not been engaged in smuggling before and is not a smuggler. And he wishes to say, he will, I hope, say anything in my behalf.

The Court: In other words, he wants to give an opinion, is that it?

The Defendant: He wishes to address—

The Court: A professional opinion as to your sanity?

The Defendant: No, not to my sanity but—no, he has already given that opinion.

The Court: As to what?

The Defendant: To show, to humbly show this Court that judgment should not be pronounced in this case.

The Court: I am going to pronounce sentence at this time. And if you have a counsel who is to replace Mr. Sheela, Mr. Sheela, of course, will be through, I imagine, with his assignment?

The Defendant: Your Honor, how about—

The Court: Will you keep still a minute. Don't interrupt me.

The Defendant: Before pronouncing judgment, I wish to say something, your Honor.

The Court: Well then, say it. You had that chance. Now you talk about Mr. Sheela—I mean Mr., the doctor and Mr.—

The Defendant: Mr. Shamsky.

[37] The Court: Just a minute. Just a minute.

The Defendant: I paid him. Excuse me.

The Clerk: Mr. Pederson, your Honor.

The Court: Mr. Pederson.

Now, then, what else is there you have in mind?

The Defendant: Mr. Shamsky has been retained.

The Court: If there is anything you want to say before sentence is pronounced, say it further. This is your last opportunity now.

The Defendant: Yes, I wish that judgment is not pronounced until I be given an opportunity to have Mr. Shamsky appear and show further cause, your Honor.

The Court: That motion is denied.

The Defendant: All right. Thank you.

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No. 1067

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In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN ARTHUR LUOMOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

JOHN ARTHUR LUCIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on April 5, 1962. The petition for a writ of certiorari, filed more than a year later, on April 9, 1963, is out of time under Rule 22-2 of this Court's Rules and should be dismissed for that reason.

In any event, the petition is without merit. Following petitioner's conviction in the United States District Court for the Southern District of California for smuggling marihuana in violation of 21 U.S.C.

176a; a motion for new trial was argued and denied. When the court proceeded to the matter of sentence, petitioner's court-appointed counsel, Mr. Sheela, stated that he had just been informed that petitioner had engaged another attorney, Mr. Shamsky, and would like a continuance to present some matters prior to judgment (Pet. 21). Petitioner told the court that Mr. Sheela did not wish to represent him on an appeal and that he had therefore retained Mr. Shamsky who would present certain matters of which the court should know. In answer to the court's inquiry as to what those matters were, petitioner stated that he wished to call Dr. Roebuck and Mr. Pederson, the arresting officer. Dr. Roebuck, a psychiatrist who had already given his opinion on petitioner's sanity, would, petitioner said, testify to petitioner's previous occupations, which would show that petitioner was not a smuggler. Mr. Pederson would say that he believed petitioner was "set up". The United States Attorney pointed out that Mr. Pederson had testified and been cross-examined and that he had not communicated any desire to address the court at sentencing. (Pet. 22-25.) Government counsel informed the court that no one had heard from Mr. Shamsky (Pet. 23). When asked why Mr. Shamsky was not present, petitioner said that it was understood Mr. Sheela would handle the motion for a new trial and then withdraw (Pet. 23). The court refused petitioner's request and pronounced sentence, which was the minimum of five years' imprisonment (Pet. 25-26; 5).

Petitioner was not denied his right to representation by counsel at the time of his sentencing; he was represented by his trial counsel. The court was justified in refusing to delay the sentencing based upon petitioner's request, made at the last minute, to bring in substituted counsel. The United States Attorney's office had received no word of the proposed substitution and the attorney petitioner claimed to have retained was not present. The only purpose of bringing in the new attorney was to present two witnesses who, according to petitioner's offer, would have nothing relevant to bring to the attention of the court. The court's refusal to grant delay for this purpose was well within its area of discretion. *Neufield* v. *United States*, 118 F. 2d 375, 383-384 (C.A.D.C.), certiorari denied, 315 U.S. 798; *United States* v. *Paccione*, 224 F. 2d 801 (C.A. 2), certiorari denied, 350 U.S. 896; *Bilderback* v. *United States*, 249 F. 2d 271 (C.A. 5), certiorari denied, 356 U.S. 946; *Brown* v. *United States*, 264 F. 2d 363 (C.A.D.C.), certiorari denied, 360 U.S. 911. Since petitioner received the minimum sentence permissible under the statute, petitioner can in no event show prejudice.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

APRIL 1963.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 1007

JOHN ARTHUR LUOMOLA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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Supreme Court of the United States

October Term 1962

No. 1007

JOHN ARTHUR LEWIS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

This reply brief is submitted in response to the memorandum in opposition of the Solicitor General.

At the outset this Court should note that the Solicitor General does not contest the principles of constitutional law set forth in the Petition for Certiorari that a criminal defendant is entitled to counsel of his own choice (P.B. 6,9)* and that counsel for a defendant at the time of sentence is essential for the protection of the defendant's constitutional rights in a criminal case (P.B. 9-10).

The Solicitor General attempts to avoid the entire thrust of the important constitutional questions raised in the area of representation by counsel of a defendant accused of a crime by contending, *inter alia*, that petitioner was represented by his trial counsel at sentencing; that the only reason petitioner had for new counsel was to present two witnesses and that since petitioner received the minimum sentence no prejudice was shown (O.B. 5).

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* "P.B." denotes the Petition for Certiorari and "O.B." denotes the Opposing Brief of the Respondent.

These arguments do not properly reflect the entire record." The trial counsel referred to was the Court appointed counsel whom petitioner had discharged and wanted to replace at sentencing by counsel of his own choice, and who had expressed a desire to withdraw (P.B. 21). At several points petitioner noted that the reason for retention of new counsel was to present motions directed at the legality of the conviction or the jurisdiction of the Court, in petitioner's layman's language "To show * * * legal cause why judgment should not be pronounced against this defendant" (P.B. 24; 26). And, of course, if the motions of petitioner's counsel of his own choice would go to the legality of the conviction or the jurisdiction of the Court to pronounce sentence then, the fact that petitioner may have received the minimum sentence is irrelevant.

More important, the argument of the Solicitor General would vitiate the fundamental principles above mentioned of the right of a defendant to have counsel of his own choice and the right to such counsel at the time of sentencing. These are rights which must remain inviolate if they are to retain their vitality. It is not for the Trial Judge, or the U. S. Attorney, or the Appellate Court to determine whether the petitioner could have been aided by counsel of his own choice at time of sentence. Only the defendant's counsel of his own choice is adequately equipped to determine whether there are, and the nature of, effective motions and procedures on behalf of the defendant. *Cf. Jencks v. United States*, 353 U. S. 657, 668-669. The very nature of our adversary system of justice requires that defendant's counsel be the sole determiner of the availability and merits of motions to be made on behalf of the defendant. To give credence to the Solicitor General's argument can only result in an erosion of the principles of right to counsel of one's own choice and the right to counsel at sentencing since such rights can not be made dependent upon what the United States or an appellate court may envision or conclude as to the defenses that such counsel could have raised on behalf

of his client. The very principle of the right to counsel is so important and fundamental as to foreclose any search by the Court as to the prejudice resulting from the denial of counsel. *Glasser v. United States*, 315 U. S. 60, 76.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this reply, a Writ of Certiorari should be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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